

FEDERAL MARITIME COMMISSION

DOCKET NO. 13-04

STREAK PRODUCTS, INC., and SYX DISTRIBUTION, INC.

v.

UTi, UNITED STATES, INC.

**INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT
AND GENERAL RELEASE AND DISMISSING PROCEEDING WITH PREJUDICE¹**

On September 4, 2014, complainants Streak Products, Inc. (Streak) and SYX Distribution, Inc. (SYX Distribution) and respondent UTi, United States, Inc. (UTi) filed a Joint Submission in Support of Motion for Settlement and Voluntary Dismissal. The parties also ask that their Confidential Settlement Agreement and General Release be kept confidential. The parties are represented by counsel. The settlement agreement is approved and the request to keep it confidential is granted.

BACKGROUND

Streak is a Delaware corporation that manufactures computer storage devices. UTi is a non-vessel-operating common carrier licensed by the Commission, License No. 001792. UTi provided transportation services to Streak from 2003 or earlier, transporting by water container shipments between United States ports and foreign ports.

On April 12, 2013, Streak filed a Complaint with the Secretary alleging that UTi violated three sections of the Shipping Act of 1984: (1) 46 U.S.C. § 41104(2) by charging Streak rates greater than those stated in its published tariff; (2) 46 U.S.C. § 41104(4) by charging Streak rates greater than those it charged other shippers; and (3) 46 U.S.C. § 40501 by failing to keep open to public inspection in its tariff system tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and any through transportation route that has been

¹ This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

established. Streak contends that it has suffered actual injury as a result of UTi's violations. On April 18, 2013, the Secretary served the Complaint and Notice of Filing of Complaint and Assignment on UTi. On January 23, 2014, I granted a motion for leave to file an amended complaint adding Streak affiliate SYX Distribution as a complainant. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Jan. 23, 2014) (Order Granting Motion for Leave to File Amended Complaint).

On August 20, 2014, the parties submitted a Joint Motion of Settlement and Voluntary Dismissal and a Confidential Settlement Agreement and General Release.

Pursuant to . . . Commission Rules of Practice § 502.72(a)(1), Complainants . . . and Respondent . . . hereby notify the Administrative Law Judge . . . that the parties have entered into a settlement agreement We hereby enclose a copy of the Agreement

We further provide notice that the Complainants will move to voluntarily dismiss the Complaint in the above-captioned proceeding with prejudice, the parties to bear their own costs and attorneys' fees, within thirty (30) days of this notice. We request that all activity in this docket be stayed for thirty (30) days so that the Parties may finalize settlement.

(Joint Motion of Settlement and Voluntary Dismissal.)

Because the Commission requires settlements to be reviewed, I ordered the parties to file a joint memorandum addressing the Commission standards for the approval of settlements. I also required the parties to file a joint motion justifying confidentiality of the settlement agreement. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Aug. 22, 2014) (Order Staying Briefing Schedule and Requiring Supplements to Record). The parties' September 4, 2014, filing complies with this order.

Regarding the settlement agreement, the parties state:

[T]he Parties' settlement reflects a fair and considered judgment of the merits of their respective positions, the desire to avoid unnecessary litigation costs and expense, and the desire to avoid the risks inherent in litigation. The settlement is the product of arms-length negotiations, in which counsel for both parties participated, and is free of fraud, duress, or undue influence. The Parties also submit that the settlement is free of mistake or other defects which might make it unapprovable.

Further, the settlement does not contravene law or public policy. It is not an unjust or discriminatory device, has no adverse effect on any third parties or the market for transportation services, and does not run afoul of the Shipping Act. Instead, it constitutes a prudent decision to settle costly litigation in which the

ultimate outcome was uncertain. In sum, because the settlement is fair, reasonable and adequate, and is the product of prudent and considered judgment on the part of the Parties, it should be approved.

(Joint Submission in Support of Motion for Settlement and Voluntary Dismissal at 2-3.)

The parties also ask that the settlement be kept confidential.

The settlement contains proprietary and business sensitive information that should be protected from public disclosure. The settlement specifically deals with payment made to resolve all claims related to the instant matter, as well as commercially sensitive terms governing the release of these claims. Moreover, the settlement contains an express provision that the Parties will not act, directly or indirectly, to reveal the existence or content of the Agreement. Accordingly, the Parties respectfully request confidential treatment of the settlement agreement.

(*Id.* at 3.)

DISCUSSION

I. THE SETTLEMENT AGREEMENT IS APPROVED.

Using language borrowed in part from the Administrative Procedure Act,² Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b). The Commission has consistently adhered to a policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of

² "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.” *Id.* However, if “a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.” *Old Ben Coal*, 18 S.R.R. at 1093. “[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.” *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

“Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation.” *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the Confidential Settlement Agreement and General Release, which was signed by the parties after the opportunity to consult their attorneys, and the verified Amended Complaint, the Answer, and the record in this proceeding, and engaging in every presumption which favors a finding that the Agreement is fair, correct, and valid, I find that the Confidential Settlement Agreement and General Release does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Therefore, the Confidential Settlement Agreement and General Release is approved.

II. THE REQUEST FOR CONFIDENTIALITY IS GRANTED.

Pursuant to Commission Rule 119, parties may request confidentiality of documents filed with the Commission. 46 C.F.R. § 502.119. The parties ask that the Confidential Settlement Agreement and General Release be kept confidential.

The Commission has a history of permitting agreements that settle private complaints brought pursuant to 46 U.S.C. § 41301 to remain confidential. “If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests.” *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted), admin. final Jan. 17, 2001. *See also American Stevedoring, Inc. v. The Port Authority of New York and New Jersey*, FMC No. 10-05 (ALJ Oct. 27, 2011), admin. final (FMC Dec. 2, 2011) (notice not to review); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996), admin. final (FMC Mar. 14, 1996); *Int’l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991), admin. final (FMC Sept. 6, 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See, e.g., Schoeps v. The Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009). *See also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

On the other hand, there is a presumption of openness to public records that suggests parties should not be permitted to keep their settlements confidential as a matter of course.

Under the common law, there is a long-standing presumption of public access to judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); *see also In re Boston Herald, Inc.*, 321 F.3d 174, 189 (1st Cir. 2003). This presumption of access “helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.” *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (internal quotation marks and citations omitted). . . . Although these examples demonstrate that it is within a court’s discretion to curtail the common law presumption of public access, “[o]nly the most compelling reasons can justify non-disclosure of judicial records.” *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (internal quotation marks omitted).

In re Gitto Global Corp., 422 F.3d 1, 5 (1st Cir. 2005). “[B]lanket [protective] orders are inherently subject to challenge and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document.” *San Jose Mercury News, Inc. v. U.S. Dist. Court-Northern Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999) (construing protective order entered pursuant to Fed. R. Civ. P. 26(c)).

For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted. *See Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (holding that “broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test”); *see also San Jose Mercury News, Inc.*, 187 F.3d at 1102 (holding that to gain a protective order the party must make “particularized showing of good cause with respect to any individual document”).

Phillips ex rel. Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1210-1211 (9th Cir. 2002) (construing Rule 26(c)).

The full text of the Confidential Settlement Agreement and General Release has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' motion for confidential treatment of the Confidential Settlement Agreement and General Release is granted. The settlement agreement will be maintained in the Secretary's confidential files.

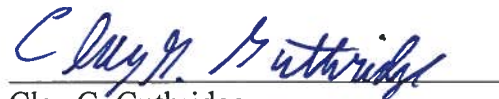
O R D E R

In consideration of the foregoing, it is hereby

ORDERED that the Confidential Settlement Agreement and General Release between complainants Streak Products, Inc., and SYX Distribution, Inc., and respondent UTi, United States, Inc. be **APPROVED**. It is

FURTHER ORDERED that the request to seal the Confidential Settlement Agreement and General Release be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.



Clay G. Guthridge
Administrative Law Judge